IN THE
MISSOURI SUPREME COURT

RODNEY MCINTOSH,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. SC93118
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE ANGELA T. QUIGLESS, JUDGE AT TRIAL,
SENTENCING AND POST-CONVICTION PROCEEDINGS

APPELLANT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

A jury in the City of St. Louis convicted Appellant, Rodney McIntosh, of statutory sodomy in the first degree. On July 12, 2006, the circuit court sentenced Appellant to twenty-five years in the Missouri Department of Corrections.

Appellant filed an appeal from his conviction, State of Missouri v. Rodney McIntosh, 231 S.W.3d 255 (Mo. App. E.D. 2007). The Missouri Court of Appeals affirmed the conviction and the Mandate issued September 28, 2007. Appellant filed his *pro se* motion for post-conviction relief under Missouri Supreme Court Rule 29.15 on or about December 13, 2007. Post-conviction counsel filed an amended motion on June 13, 2008. The motion court denied relief without a hearing on February 8, 2012. Notice of Appeal to the Missouri Court of Appeals was filed on March 19, 2012. The Court of Appeals affirmed the denial of relief in a *per curiam* order. However, this Court sustained Appellant's application for transfer on April 30, 2013. This Court has jurisdiction over this appeal, Article V, Section 10, Mo. Const.; Rule 83.04.

* * *

The Record on Appeal will be cited to as follows: the Legal File from the direct appeal (transferred from ED88453), "LF"; the Legal File relating to this PCR appeal, "PCR-LF"; and the Trial and Sentencing Transcripts (transferred from ED88453), "TR" and "SENT TR" respectively.

Statement of Facts

The State charged Appellant, Rodney McIntosh, with first degree statutory sodomy for an incident occurring around January 5th or 6th, 2005 in the City of St. Louis (LF 8). The following facts from trial and the post-conviction case bear on this appeal:

Prior bad acts evidence and witness Angelo Veal

At trial, in her opening statement, the prosecutor began by saying that the jury was going to hear the alleged actions by Appellant happened not just once in St. Louis City, but also in Jennings, in St. Louis County, on a prior occasion (TR 186). Later, on direct examination of the accuser H.P.'s mother, Cherise Payne, the State elicited that Ms. Payne's daughter told her the first time Appellant touched her was in Jennings (TR 222). Finally, during the testimony of Detective Donna Kettenacker, the State again elicited testimony that H.P. told the detective that Appellant touched her in Jennings (TR 258).

At sentencing, Appellant testified he gave his trial counsel, Eric Barnhart, the names and addresses of potential witnesses, one of whom was Angelo Veal (SENT TR 11). Mr. Barnhart, who was not placed under oath, acknowledged he spoke with Mr. Veal but related he "did not like some of the things he said, so I didn't want to use him as a witness" (SENT TR 11). The court asked counsel whether the witnesses, in counsel's opinion, would not have suited any defense (SENT TR 11). Counsel responded "Correct" (SENT TR 12).

Post-conviction, Appellant complained about the absence of Mr. Veal from trial. Angelo Veal was a witness who could have testified Appellant did not touch H.P. while in Jennings (PCR-LF 18-23). Appellant pled in pertinent part,

> Angelo was with Movant on the evening in Jennings when Movant allegedly touched H.P., and Angelo could testify that Movant, on that evening, never touched H.P. at all. Moreover, with his refutation of the uncharged, unsubstantiated claims, his testimony would have supported Movant's testimony and cast doubt on the state's witnesses.

(PCR-LF 22).

Based on the dialogue from sentencing, the motion court concluded it did not need an evidentiary hearing (PCR-LF 41). Because Mr. Barnhart agreed he had exercised his professional judgment and none of the witnesses would have provided "a viable defense," no hearing was necessary (PCR-LF 41).

The state's voir dire

The State asked the venire panel whether they could return a verdict:

- if there was no physical evidence (TR 95-97),
- if they heard only testimonial evidence (TR 95-97),
- if they only heard from one eyewitness (TR 100),
- if that eyewitness was a three-year old child (TR 102-105),
- if the child victim delayed in reporting (TR 116),
- if some of the state's witnesses were police officers (TR 114),

- if there was touching with a hand or finger only (TR 118) and,
- if there was no evidence of injury (TR 118).

At one point, the assistant circuit attorney paused to explain the reasons for her questions to one potential juror,

> Well the evidence is her and what she says, okay, that's the point I'm trying to hammer here. She is - - the evidence is her telling you what happened, okay? Would you be able to listen to her and if you believed her beyond a reasonable doubt, convict the defendant of what he's been charged with?

(TR 110).

Post-conviction, Appellant complained that trial counsel had not lodged an objection to the State's effort to try its case to the venire panel and seek commitments from the jury as to the nature of the evidence (PCR-LF 23-26). The motion court rejected this claim without a hearing concluding: 1) the questions were permissible, and 2) the questions – delving into the evidence – were important to root out bias and prejudice (PCR-LF 41-43).

Evidence of other allegations by H.P.

Immediately prior to trial, the State moved to prohibit any mention that H.P. had made another apparently unsubstantiated allegation of sexual abuse (TR 5). The State reasoned it was irrelevant (though trial counsel had not stated to what use he may have put it) because it had not been proven false (TR 5).

Trial counsel acknowledged the other complaint but agreed with the State's rationale saying,

> I mean I looked up the Western District case and the defense attorney tried to bring out I guess prior accusations with someone else or prior abuse of someone else, and to try to show that the victim knew vocabulary, and because of that and the Western District basically said it's Rape Shield, and the defense attorney could not bring that up. So I mean I've got the case with me. So I wasn't planning - - I looked it up. I don't try to breach what the law is.

(TR 6). Trial counsel did not mention H.P. had made other complaints and introduced no evidence on the subject.

Post-conviction, Appellant alleged counsel was ineffective for not having introduced evidence of that other complaint (PCR-LF 27-31). Trial counsel too readily acquiesced in the State's efforts to keep the incident out of evidence (PCR-LF 27-29). Appellant explained that evidence of the prior allegation, would have provided a viable defense in numerous ways,

> First, if the prior allegation was false (and counsel only had to show that to a reasonable probability), then it would have been useful to impeach the believability of H.P. and, by extension, the persons to whom she disclosed (Cf. Tr. 347). Second, if the allegation was unsubstantiated because Cherise Payne had not

followed up, then it would have refuted the state's later argument that Cherise was believable because of her over-reaction, "…and she told you, she was honest, she said she took time, because she thought, you know what I'm going to kill this guy. I am going to murder this person who violated my baby." (Tr. 331). Third, if true, it would have explained why a three-year old might come up with such an allegation; because it had happened before. Indeed, the state argued to jurors they should convict because the only time abuse occurred was the hands of Movant, "She's three years old. She can't fabricate or come up with something so horrible, unless it happened" (Tr. 347). Fourth, if true, it might have cast reasonable doubt whether the incident H.P. (who was but three when the charged incident was supposed to have occurred) blamed Rodney for was one he actually committed or one that had occurred with some other person. Fifth, regardless whether it was true or false, the fact was that she had made a complaint which presumably was investigated. Yet the state made much of H.P.'s spontaneity when meeting with Luzette Wood, arguing her responses showed she was not coached (Tr. 332). But, of course, the state objected to evidence that H.P. had been interviewed before or questioned before or made other allegations before.

(PCR-LF 29-30). Appellant pled he would produce the DFS worker, Dennis Gordon, who investigated H.P.'s earlier complaint (PCR-LF 31).

The motion court rejected this claim without a hearing concluding evidence of the prior incident was not admissible thus counsel could not have been ineffective for failing to present it (PCR-LF 43-44). The court reckoned that evidence of other incidents was only admissible if the State tried to show the defendant was the sole source of the victim's precocious sexual knowledge (PCR-LF 44).

Finally, Appellant complained in a separate post-conviction claim that the State argued the absence of other allegations when urging the jury to convict Appellant. The State argued H.P. was more believable because she had never been subject to such contact before because, "She's three years old. She can't fabricate or come up with something so horrible, unless it happened," (TR 347). Similarly, the State argued the spontaneity of H.P.'s revelations showed their truth, despite the fact H.P. had made such complaints in the past about which the jury did not know (TR 332-33, 348). The State argued that H.P. could not "imagine" this had happened unless it really happened, even though the circuit attorney was aware there was evidence it might have happened before but with someone else (TR 346). Appellant wrote that the State's arguments amounted to misconduct because it had moved to keep evidence of prior allegations from another source out of evidence but then argued the absence of such evidence (PCR-LF 32-35).

As to Appellant's final complaint of prosecutorial misconduct, the court concluded the State had not argued the evidence did not exist when it did or that it existed when it knew it did not (PCR-LF 45). Rather the State's arguments were "general statements about behaviors and other characteristics of a young sexual abuse victim" (PCR-LF 45). This appeal followed (PCR-LF 46).

Points Relied On

I.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing because Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to produce witness Angelo Veal who would have testified Appellant did not sexually touch H.P. when the three were together in Jennings rebutting the prior uncharged conduct and impeaching H.P. and her mother's believability. The motion court's denial of relief – based solely on counsel's meager comments from the 29.07 inquiry – leaves a definite and firm impression a mistake has been made because the record does not conclusively refute Appellant's claim.

Schmedeke v. State, 136 S.W.3d 532 (Mo. App. E.D. 2004)

State v. Blue, 811 S.W.2d 405 (Mo. App. E.D. 1991)

State v. Driver, 912 S.W.2d 52 (Mo. banc 1995)

Rule 29.15

Mo. Constitution, Art I, §§10 and 18(a)

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

II.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to object to extensive State questioning of the venire panel which sought commitment as to how prospective jurors would treat certain evidence. The motion court's denial of relief – stating such testing of the venire with the facts of the case was necessary "to root out bias and prejudice" – leaves a definite and firm impression that a mistake was made.

State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987)

State v. Crew, 803 S.W.2d 669 (Mo. App. E.D. 1991)

State v. Reed, 629 S.W.2d 424 (Mo. App. W.D. 1981)

Rule 29.15

Mo. Constitution, Art I, §§10 and 18(a)

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

III.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to introduce evidence that H.P. had previously made another allegation of sexual abuse coming from a source other than Appellant. The motion court countered that excluding such evidence was nevertheless proper because the State had not tried to show Appellant was the sole source of the victim's precocious sexual knowledge. But the court's refusal to acknowledge the many uses to which the evidence could be put and the State's argument of the lack of other perpetrators leaves a definite and firm impression a mistake has been made.

State v. Lampley, 859 S.W.2d 909 (Mo. App. E.D. 1993)

State v. Sales, 58 S.W.3d 554 (Mo. App. W.D. 2001)

State v. Samuels, 88 S.W.3d 71 (Mo. App. W.D. 2002)

Rule 29.15

Mo. Constitution, Art I, §§10 and 18(a)

Revised Statutes of Missouri §491.015

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

IV.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, §§ 10 and 18(a) of the Missouri Constitution because the State engaged in misconduct by arguing matters the trial court had excluded at the state's request. The State successfully sought to prohibit any mention of a prior allegation made by H.P. directed to another perpetrator. However, later, in arguing its case to the jury, the state argued the non-existence of the very evidence it moved to keep from the jury. The motion court's ruling that the State had not so argued leaves a definite and firm impression a mistake has been made.

State v. Luleff, 729 S.W.2d 530 (Mo. App. E.D. 1987)

State v. Price, 541 S.W.2d 777 (Mo. App. E.D. 1976)

State v. Weiss, 24 S.W.3d 198 (Mo. App. W.D. 2000)

Rule 29.15

Missouri Rules of Professional Responsibility, Rule 4-3.8

Mo. Constitution, Art I, §§10 and 18(a)

U.S. Constitution, Fifth and Fourteenth Amendments

Argument

I.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing because Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to produce witness Angelo Veal who would have testified Appellant did not sexually touch H.P. when the three were together in Jennings rebutting the prior uncharged conduct and impeaching H.P. and her mother's believability. The motion court's denial of relief – based solely on counsel's meager comments from the 29.07 inquiry – leaves a definite and firm impression a mistake has been made because the record does not conclusively refute Appellant's claim.

Standard of Review and Preservation

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs v. State, 773 S.W.2d 167 (Mo. App. E.D. 1989). Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson v. State, 719 S.W.2d 912 (Mo. App. E.D. 1986); Rule 29.15(k).

Appellant included his complaint about Angelo Veal's absence from trial in his post-conviction motion (PCR-LF 18-23). Thus the matter is preserved for review. Mouse v. State, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002).

Facts

At trial, in her opening statement, the assistant circuit attorney began by saying that the jury was going to hear that the alleged actions by Appellant happened not just once in St. Louis City, but also in Jennings, in St. Louis County, on one other occasion (TR 186). Later, on direct examination of the accuser H.P.'s mother, Cherise Payne, the State elicited that Ms. Payne's daughter told her the first time Appellant touched her was in Jennings (TR 222). Finally, during the testimony of Detective Donna Kettenacker, the State again elicited testimony that H.P. told the detective that Appellant touched her in Jennings as well (TR 258).

At sentencing, Appellant testified he gave his trial counsel the names and addresses of potential witnesses, one of whom was Angelo Veal (SENT TR 11). Mr. Barnhart acknowledged he spoke with Mr. Veal but he "did not like some of the things he said, so I didn't want to use him as a witness" (SENT TR 11). The court then asked counsel whether the witnesses, in counsel's opinion, would not have suited any defense (SENT TR 11). Counsel responded "Correct" (SENT TR 12).

Analysis

Appellant had a right to effective assistance of counsel. "The Sixth Amendment to the United States Constitution establishes the right to counsel, a

fundamental right to all criminal defendants, which extends to state defendants through the Due Process Clause of the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 355 (1963). This right is designed to assure fairness, and thus to give legitimacy to the adversarial process. To fulfill its role of ensuring a fair trial, the right to counsel must be the right to "effective" assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365 (1986); McMann v. Richardson, 397 U.S. 759 (1970). Here, Appellant complained counsel was ineffective for failing to have Mr. Veal testify at trial.

When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, his attorney's performance was deficient and second, he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687-689 (1984); Seales v. State, 580 S.W.2d 733, 735-736 (Mo. banc 1979). To prove ineffective assistance, a defendant must show counsel's performance did not conform to the degree of skill care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. State v. Butler, 951 S.W.2d 600 (Mo. banc 1997) *citing* Strickland, *supra* at 687; State v. Wise, 879 S.W.2d 494, 524 (Mo. banc 1994). To prove prejudice, a defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Shurn, 866 S.W.2d 447, 468 (Mo. banc 1993). Appellant pled, post-conviction, that counsel was deficient because Mr. Veal was a material witness and that he was prejudiced by Mr. Veal's absence from trial.

Angelo Veal would have testified that on that particular evening, Appellant could not have touched H.P., because Angelo was there with them the entire time (PCR-LF 19). Prior to trial, Appellant wrote, counsel knew of Angelo Veal and of the supposed incident in Jennings (PCR-LF 19). Trial counsel had a professional obligation to investigate the case or to make a reasonable decision that a particular investigation is unnecessary. Martin v. State, 712 S.W. 2d 14, 16 (Mo. App. E.D. 1986). The motion court was obliged to conduct a hearing on Appellant's claim unless the record conclusively refuted Appellant's claim. Rule 29.15(h).

In the absence of an evidentiary hearing there can be no basis for determining counsel's reason – or the reasonableness of that reason – for not calling a witness. State v. Blue, 811 S.W.2d 405, 410 (Mo. App. E.D. 1991); State v. Talbert, 800 S.W.2d 748, 749 (Mo. App. E.D. 1990). Here, the court used Mr. Barnhart's bare assertion of "trial strategy" at sentencing to reject a hearing. This was error.

In Schmedeke v. State, 136 S.W.3d 532 (Mo. App. E.D. 2004), the Missouri Court of Appeals reversed for an evidentiary hearing when the motion court committed precisely the same error. In Schmedeke, the defendant complained, pretrial, that his lawyer had not produced any witnesses to testify on his behalf. 136 S.W.3d at 533. Trial counsel answered that her decision to forego calling witnesses was a matter of trial strategy. Id. Likewise here, counsel asserted he did not like what Angelo Veal might say and the court labeled counsel's conduct "strategy." The court noted in reversing the Schmedeke case, "The mere

assertion that trial counsel's conduct was trial strategy is not sufficient to preclude a movant from obtaining relief on a claim of ineffective assistance of counsel." Id.

In State v. Sublett, 887 S.W. 2d 618 (Mo. App. W.D. 1994), the Court of Appeals reversed for a hearing even though trial counsel informed the court Mr. Sublett had not learned of alibi witnesses absent from trial until after the trial. Even on that record, in the absence of an evidentiary hearing, the court lamented "we deal in speculation and conjecture" Id. at 622. Though Mr. Barnhart might not have liked some of what Mr. Veal had to say, in the absence of a hearing there is no means, except through speculation, to determine the reasonableness of his strategy. The constraint imposed on trial counsel regarding trial strategy is that his or her actions must be reasonable under prevailing professional norms. State v. McCarter, 883 S.W.2d 75, 79 (Mo. App. S.D. 1994).

In Matthews v. State, 175 S.W.3d 110, 115, (Mo. banc 2005), this Court dealt with a facially similar case. In Matthews, the movant complained his lawyer had not played a surveillance tape at trial. Id. Though his lawyer did not explain his reasoning, this Court noted,

> he did indicate that he made the decision only after discussing the matter at length with his client. Further, the motion court concluded that the tapes could have bolstered the prosecution witnesses' testimony and emphasized matters that would have been detrimental to Movant.

Id. at 115. But, given the record, this Court was able to conclude Matthews had failed to meet his burden of alleging counsel was ineffective and that he was thereby prejudiced. Id. By contrast here, the most defense counsel could say was that he did not like what Mr. Veal had to say (SENT TR 11). There is no record whether counsel discussed his decision with Appellant or what it was about Angelo Veal that made him a bad witness.

Ironically, it seems Appellant would have merited a hearing if he not spoken his mind at sentencing and simply expressed satisfaction with counsel. This Court has made clear that "routine" inquiries made at sentencing do not necessarily refute latter a defendant's claim of ineffectiveness. Webb v. State, 334 S.W.3d 126, 131 (Mo. banc 2011); State v. Driver, 912 S.W.2d 52, 55 (Mo. banc 1995). Here, Appellant complained Mr. Veal was absent, counsel defended he "didn't like some of the things [Veal] said" and on that slender record the motion court divined counsel exercised reasonable trial strategy. There is no means, except through speculation, to determine the reasonableness of counsel's strategy. The motion court could not conclusively say trial counsel's aversion to what Mr. Veal said was reasonable under the circumstances except by conjecture that counsel *must have had* a good reason not to call the witness.

The constraint imposed on trial counsel regarding trial strategy is that his or her actions must be *reasonable* under prevailing professional norms. McCarter, 883 S.W.2d at 79. Without an evidentiary hearing, there was no means to determine the reasonableness of counsel's actions. The reasonableness of

counsel's actions is evaluated in the light of the circumstances of the case, defense, and trial happenings (Francis v. State, 183 S.W.3d 288, 300-301 (Mo. App. W.D. 2005)) – here the court merely presumed counsel was effective.

Appellant pled facts supported by the record which entitle him to relief. Therefore, the motion court clearly erred when it denied Point 8(a) and 9(a) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for an evidentiary hearing on Appellant's claims. Appellant was deprived of his rights to due process of law and effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

II.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to object to extensive State questioning of the venire panel which sought commitment as to how prospective jurors would treat certain evidence. The motion court's denial of relief – stating such testing of the venire with the facts of the case was necessary "to root out bias and prejudice" – leaves a definite and firm impression that a mistake was made.

Standard of Review and Preservation

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs, *supra*. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson, *supra*; Rule 29.15(k). Appellant included his complaint about the State's *voir dire* questions in his post-conviction motion (PCR-LF 23-26). Thus the matter is preserved for review. Mouse, *supra*.

Facts

The State asked the venire panel about numerous aspects of its case and its evidence so to gauge the reactions of potential jurors. The assistant circuit attorney asked whether venire persons could return a verdict:

- if there was no physical evidence (TR 95-97),
- if they heard only testimonial evidence (TR 95-97),
- if they only heard from one eyewitness (TR 100),
- if that eyewitness was a three-year old child (TR 102-105),
- if the child victim delayed in reporting (TR 116),
- if some of the state's witnesses were police officers (TR 114),
- if there was touching with a hand or finger only (TR 118) and,
- if there was no evidence of injury (TR 118).

None of the questions drew an objection from trial counsel.

Post-conviction, Appellant complained that trial counsel had not lodged an objection to the State's effort to try its case to the venire panel and seek commitments from the jury as to the nature of the evidence (PCR-LF 23-26). The motion court rejected this claim as well concluding: 1) the questions were permissible, and 2) the questions – delving into the evidence – were important to root out bias and prejudice (PCR-LF 41-43).

Analysis

The Sixth Amendment's guarantee that an accused shall have the right to assistance of counsel applies to state prosecutions via the Fourteenth Amendment.

Gideon, *supra*; Faretta v. California, 422 U.S. 806 (1975). This guarantee would be little more than an empty promise if it did not also require such assistance of counsel to be effective. Cuyler v. Sullivan, 446 U.S. 335 (1980); Sanders v. State, 738 S.W.2d 856 (Mo. banc 1987).

To prove ineffective assistance, a defendant must only show that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and that the defendant was thereby prejudiced. Butler, *supra* citing Strickland, 466 U.S. at 687. To prove prejudice, a defendant must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Shurn, 866 S.W.2d at 468.

Any attempt to commit prospective jurors to a particular course of future conduct is an abuse of the *voir dire* process. State v. Reed, 629 S.W.2d 424, 426 (Mo. App. W.D. 1981); State v. Tarkington, 794 S.W.2d 297, 299 (Mo. App. E.D. 1990). Moreover, when the question is phrased in such a manner that jurors feel obligated to react in a particular manner, prejudice may result. State v. Abbott, 654 S.W. 2d 260, 274 (Mo. App. S.D. 1983). Such was the case with the state's questions here which amounted to nothing more than a preview of the facts followed by asking jurors if they would be able to listen and accept the contemplated evidence and still find Appellant guilty. Even if the subject matter was appropriate for *voir dire* interrogation, the phrasing of the questions rendered them improper. State v. Garrett, 627 S.W.2d 635, 642 (Mo. banc 1982). Any question requiring prospective jurors to "agree" with some proposition stands in

danger of violating the proscription against seeking commitments during *voir dire* examination.

The prejudice of counsel's inaction was two-fold. First, the State was allowed to identify (and remove) normally scrupled jurors. Second, the State's questions of the venire panel suggested there was some minimal "legal" amount or type of evidence required. While it may be true that physical evidence is not always required, but that is so when other evidence is particularly compelling. But the State's questions suggested numerous deficiencies in its evidence were of no legal consequence and no bar to a guilty verdict.

The motion court ruled the questions were proper to root out "bias and prejudice" (PCR-LF 42). As the motion court suggested, such question have been approved of by Missouri Courts as not error. See e.g; State v. Crew, 803 S.W.2d 669, 670 (Mo. App. E.D. 1991), State v. Lottman, 762 S.W.2d 539 (Mo. App. E.D. 1988), and State v. Clark, 981 S.W.2d 143 (Mo. banc 1998). The latter case, Clark, makes the point that certain critical facts – facts with substantial potential for disqualifying bias—must be divulged to the venire. Clark, 981 S.W. 2d at 147. However, parties may not try their cases in *voir dire* by presentation of the evidence in explicit detail. State v. Antwine, 743 S.W.2d 51, 58 (Mo. banc 1987). That is what the State did here. The State was not searching for potential jurors with odd, dogmatic prejudices, but rather sought to exclude jurors who might have problems with the paucity of evidence. By seeking commitments from the jury to "return a verdict," the state effectively tried its case in *voir dire*.

The State put it bluntly to one potential juror that it wanted to know if it could get a conviction on the facts it had,

> Well the evidence is her and what she says, okay, that's the point I'm trying to hammer here. She is - - the evidence is her telling you what happened, okay? Would you be able to listen to her and if you believed her beyond a reasonable doubt, convict the defendant of what he's been charged with?

(TR 110). There could be no clearer request for a commitment.

Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied Point 8(b) and 9(b) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for an evidentiary hearing on Appellant's claims. Appellant was deprived of his rights to due process of law and effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

III.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his rights to due process and effective assistance of counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution because trial counsel failed to introduce evidence that H.P. had previously made another allegation of sexual abuse coming from a source other than Appellant. The motion court countered that excluding such evidence was nevertheless proper because the State had not tried to show Appellant was the sole source of the victim's precocious sexual knowledge. But the court's refusal to acknowledge the many uses to which the evidence could be put and the state's argument of the lack of other perpetrators leaves a definite and firm impression a mistake has been made.

Standard of Review and Preservation

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs, *supra*. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson, *supra*; Rule 29.15(k). Appellant included in his post-conviction motion a complaint about counsel's

failure to offer evidence concerning a prior sexual allegation made by H.P. (PCR-LF 26-31). Thus the matter is preserved for review. Mouse, *supra*.

Facts

Appellant pled that prior to trial, his lawyer learned that H.P. had made another allegation besides the one charged (and the uncharged one against Appellant) involving a different alleged perpetrator (PCR-LF 26-31). But immediately prior to trial, the State moved to prohibit any mention of the other accusation. The State reasoned it was irrelevant because it had not been proven false (TR 5).

Trial counsel acknowledged the other complaint and agreed with the State's rationale saying,

> I mean I looked up the Western District case and the defense attorney tried to bring out I guess prior accusations with someone else or prior abuse of someone else, and to try to show that the victim knew vocabulary, and because of that and the Western District basically said it's Rape Shield, and the defense attorney could not bring that up. So I mean I've got the case with me. So I wasn't planning - - I looked it up. I don't try to breach what the law is.

(TR 6). Counsel did not present evidence H.P. had made other sexual allegations.

Post-conviction, Appellant complained about counsel's lapse. Appellant pointed out that whether that prior allegation was true or false, the fact a report

was made still had great logical relevance to the case (PCR-LF 26-31). Broadly, if it was false then H.P. and her mother were less believable as a result (PCR-LF 29-30). If the prior allegation was true, that too cast reasonable doubt on the State's case because H.P. might have blamed Appellant for an incident that occurred with another person (PCR-LF 29-30). Also, Appellant wrote, the State made much of H.P.'s "spontaneity" when meeting with investigators while hiding the fact she had previously made similar allegations (PCR-LF 29-30).

Analysis

As noted above, Appellant enjoyed a right to effective assistance of counsel. When a criminal defendant seeks post-conviction relief on a claim of ineffective assistance of counsel, he must establish first, that his attorney's performance was deficient and second, that he was prejudiced thereby. Strickland v. Washington, 466 U.S. at 687-689; Seales, 580 S.W.2d at 735-736. Appellant complains trial counsel was ineffective for failing to present evidence H.P. had lodged another allegation of sexual abuse against a different person.

State v. Sales, 58 S.W.3d 554 (Mo. App. W.D. 2001), suggests the Rape Shield statute (§491.015 RSMo (2000)) may render inadmissible evidence of prior sex abuse allegations. But that statute must yield to the requirements of due process. In State v. Samuels, the defendant was granted a new trial because the trial court barred inquiry into past allegations made by the victim so to explain the victim's precocious knowledge. 88 S.W.3d 71 (Mo. App. W.D. 2002). Evidence of earlier complaints is not barred by Rape Shield where it would show the victim

received a benefit from making allegations. State v. Lampley, 859 S.W.2d 909 (Mo. App. E.D. 1993). What really matters, it seems, is the use to which the proponent wants to put the evidence. *See* e.g.; State v. Douglas, 797 S.W.2d 532 (Mo. App. W.D.1990)(held prior complaint admissible to explain alternate source of injury).

The motion court concluded that because the State had not offered evidence of H.P.'s precocious sexual knowledge, evidence of the prior allegation was not admissible (PCR-LF 42). But the motion court misread the record. The State implicitly and explicitly tried to show that Appellant was the only possible abuser of H.P.

In opening statement, the State recounted Cherise's supposed bewilderment at H.P.'s complaint that her "tee-tee" hurt (TR 185-186). The jury would hear that Cherise "didn't know what to do" (TR 186). And at the hospital, doctors found redness "consistent with sexual abuse" (TR 188).

Cherise emphasized her amazement that anything sexual could have happened to her daughter and described it as her "ultimate fear" and the "last thing" she wanted to think could happen (TR 214). So visceral was her reaction to this unprecedented happening that she plotted to kill her daughter's abuser saying at one point, "I was going to shoot Rodney in the head" (TR 220, 229-230). The prospect that her daughter might have been abused never crossed her mind before H.P. said what happened (TR 225-226).

As promised by the State in its opening, Dr. Sterni, who examined H.P., noted redness in the region of H.P.'s vagina (TR 240). Such findings were "consistent" with sexual abuse (TR 241). Luzette Wood, who interviewed H.P., noted the behaviors of H.P. that showed she had not been coached (TR 285-286). H.P.'s answers and her willingness to correct herself showed her answers were "genuine" (TR 288).

Implicit in all this evidence was the notion that three-year old H.P. had never been abused previously: Cherise's supposed shock and indignation, the physical findings, and Luzette Wood's opinion that H.P. had not been coached and displayed "genuine" memories. Freed from having to deal with any issue of H.P.'s or Cherise's prior allegations about another person, the State argued H.P. and Cherise were telling the truth and thus Appellant was the only possible culprit.

The State argued that the prospect that Appellant could have touched H.P. was "unthinkable unimaginable" to Cherise (TR 328). Cherise had "no idea to think" what Appellant could have done (TR 331). It was "[u]nthinkable" to Cherise (TR 331). Without the jury knowing that H.P. had previously alleged being abused, the "genuineness" of her account to Luzette Wood took on greater significance (TR 332). So too, the redness around H.P.'s vagina "support[ed]" what happened (TR 333-334). H.P. did not make up the allegations the prosecutor argued and the jury knew that because "She's three years old. She can't fabricate or come up with something so horrible unless happened," (TR 346-347). "People don't make up someone touching them on their vagina" the prosecutor also told

the jury without fear of contradiction (TR 348). H.P. was "going from memory" and that memory was "based on the truth" (TR 349). Of course, the jury did not hear the whole truth or the context of H.P.'s revelations. H.P. might have "come up" with the allegations against Appellant because it had happened to her before or – more significantly – she had made a false accusation before. But the jury, due to counsel's lapse, did not know about the earlier complaint.

As the State candidly admitted in *voir dire*, the recollection and accuracy of a three-year old child was its whole case (TR 110).[1] The motion court's conclusion that that the State had not gained tactical advantage from suppressing evidence of the earlier allegation is simply wrong. Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied Point 8(c) and 9(c) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for an evidentiary hearing on Appellant's claims. Appellant was deprived of his rights to due process of law and effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

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[1] Presumably, the State would have likewise sought to remove potential jurors who could not "return a verdict" in light of evidence that H.P. had made an earlier accusation against another person had the court not granted its motion.

IV.

The motion court clearly erred when it denied Appellant's motion for post-conviction relief without a hearing where Appellant alleged facts not conclusively refuted by the record which, if proven, would entitle him to relief in that Appellant was denied his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, §§ 10 and 18(a) of the Missouri Constitution because the State engaged in misconduct by arguing matters the trial court had excluded at the state's request. The State successfully sought to prohibit any mention of a prior allegation made by H.P. directed to another perpetrator. However, later, in arguing its case to the jury, the State argued the non-existence of the very evidence it moved to keep from the jury. The motion court's ruling that the State had not so argued leaves a definite and firm impression a mistake has been made.

Standard of Review and Preservation

Appellate review of post-conviction motions is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. Burroughs, *supra*. Findings of facts and conclusions of law are clearly erroneous if the appellate court, upon reviewing the record, is left with the definite and firm impression that a mistake has been made. Id.; Richardson, *supra*; Rule 29.15(k). Appellant included in his post-conviction motion a complaint about the state's

exclusion of evidence of prior abuse (PCR-LF 32-35). Thus the matter is preserved for review. Mouse, *supra*.

Facts

Prior to trial, the State moved to prohibit any mention of another allegation of sexual abuse (TR 5). The State reasoned such evidence was irrelevant because it had not been proven false (TR 5). However, in the evidence phase and especially during argument, the State sought tactical advantage from the exclusion of the evidence.

In opening statement, the State recounted Cherise's supposed bewilderment at H.P.'s complaint that her "tee-tee" hurt (TR 185-186). The jury would hear that Cherise "didn't know what to do" (TR 186). And at the hospital, doctors found redness "consistent with sexual abuse" (TR 188).

Cherise emphasized her amazement that anything sexual could have happened to her daughter and described it as her "ultimate fear" and the "last thing" she wanted to think could happen (TR 214). So visceral was her reaction to this unprecedented happening that she plotted to kill her daughter's abuser saying at one point, "I was going to shoot Rodney in the head" (TR 220, 229-230). The prospect that her daughter might have been abused never crossed her mind before H.P. said what happened (TR 225-226).

As promised by the State in its opening, Dr. Sterni, who examined H.P., noted redness in the region of H.P.'s vagina (TR 240). Such findings were "consistent" with sexual abuse (TR 241). Luzette Wood, who interviewed H.P.,

noted the behaviors of H.P. that showed she had not been coached (TR 285-286). H.P.'s answers and her willingness to correct herself showed her answers were "genuine" (TR 288).

Excluding evidence that H.P. had previously been alleged to have been abused, the State portrayed H.P. and Cherise as being doubly victimized by the offense and the violation of trust. The State argued that the prospect that Appellant could have touched H.P. was "unthinkable unimaginable" to Cherise (TR 328). Cherise had "no idea to think" what Appellant could have done (TR 331). It was "[u]nthinkable" to Cherise (TR 331). Without the jury knowing that H.P. had previously alleged abuse, the "genuineness" of her account to Luzette Wood took on greater significance (TR 332). So too, the redness around H.P.'s vagina "support[ed]" what happened (TR 333-334).

H.P. did not make up the allegations the prosecutor argued; the jury knew that because "She's three years old. She can't fabricate or come up with something so horrible unless happened," (TR 346-347). "People don't make up someone touching them on their vagina" the prosecutor also told the jury without fear of contradiction (TR 348). H.P. was "going from memory" and that memory was "based on the truth" (TR 349).

Analysis

Appellant pled his right to a fair trial was violated by the State's tactic of excluding evidence of a prior complaint. If the State suspected that incident was false, then that prior complaint bore on H.P.'s and Cherise's believability. If the

earlier allegation was true, then it bore on the circuit attorney's believability because she sought to have the jury believe Appellant was the only possible source of H.P.'s complaint.

"The fundamental purpose of a criminal trial is the *fair* ascertainment of the *truth*." State v. Carter, 641 S.W.2d 54, 58 (Mo.banc1982)(emphasis added). To arrive at the truth, our system imposes on prosecutors the "duty to serve justice, not just win the case." Berger v. U.S., 295 U.S. 78, 88 (1935); Rule 4-3.8. To that end, "It is an established rule in our state that it is improper for a prosecutor, or defense attorney, to argue matters that the court has excluded." State v. Price, 541 S.W.2d 777, 778 (Mo. App. E.D. 1976) *citing* State v. White, 440 S.W.2d 457, 460 (Mo. 1969) and State v. Williams, 376 S.W.2d 133, 136 (Mo. 1964).

In State v. Weiss, the Western District found that "plain error occurred when the trial court allowed the State to tell the jury during closing argument that Defendant [charged with stealing money from another "Weiss's" bank account] failed to present any evidence that another source of funds [for Weiss' own account] existed when the State knew such evidence did exist and that it had not been introduced only because the State had successfully argued that it should be excluded." 24 S.W.3d 198, 202 (Mo. App. W.D. 2000). The prosecutor's actions "constituted ... affirmative misrepresentation and affirmative misconduct" that required the Court "to reverse and remand for a new trial." Id.

In Price, the defense failed to comply with the State's "discovery request for witnesses" and at the request of the State the trial court excluded the defense

witnesses. 541 S.W.2d at 778. In closing argument, the prosecutor called attention to the fact that the defendant testified she was with other people at the time of the offense but none of those people (her proposed witnesses) had testified at trial. Id. The Eastern District found prejudice and reversed despite the fact that "the state's case at trial was strong," because "a good deal of its strength was a result of the prosecutor's ability to discredit the appellant through cross-examination and in his closing argument." Id.

The defendant in State v. Luleff was charged with receiving stolen property. 729 S.W.2d 530, 535 (Mo. App. E.D. 1987). When defense counsel attempted to introduce a sales receipt for the property, the trial court sustained the State's objections and excluded the evidence. Id. Even though, on appeal, the Eastern District assumed the excluded evidence was inadmissible, the Court held it was plain error for the prosecutor to argue to the jury: "Where's the receipt? ... no receipt." Id. at 535-36.

In the instant case, the prosecutor kept out of evidence that H.P. and/or Cherise made a prior complaint about someone else sexually abusing H.P. Whether or not that incident had even been investigated, Cherise's outrage and shock at Appellant's supposed abuse is patently unbelievable. The motion court found nothing wrong with the State's tactic (PCR-LF 45). According to the motion court, only blatant lying – suggesting the evidence did not exist, when it really did – could amount to misconduct (PCR-LF 45). But that is precisely what the State did because the subtext for its whole case was that H.P. would not have

accused Appellant unless the crime really happened. Cherise's and H.P.'s testimony took on added significance in the absence of evidence that there had been an earlier complaint made against another person. The prosecutor argued "She's three years old. She can't fabricate or come up with something so horrible unless happened," (TR 346-347).

The motion court's conclusion that that the State had not argued the absence of evidence that it knew existed is simply wrong. Appellant pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied Point 8(d) and 9(d) of Appellant's amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for an evidentiary hearing on Appellant's claims. Appellant was deprived of his rights to due process of law and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Conclusion

WHEREFORE, for the foregoing reasons, this Court should reverse the motion court's judgment denying Appellant post-conviction relief, and remand for an evidentiary hearing.

Respectfully Submitted,

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Certificate of Service

An electronic copy of the forgoing Appellant's Substitute Brief was delivered to this Court and to the Office of the Attorney General, State of Missouri, Jefferson City, Missouri, via the Missouri E-filing System on this 17th day of May, 2013.

/S/ Scott Thompson

Attorney for the Appellant

Certificate of Compliance

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font. The word-processing software identified that this brief contains 9162 words, 1015 lines, and 44 pages including the cover page, signature block, and certificates of service and of compliance, and the cover page of the Appendix. In addition, I hereby certify that this document has been scanned for viruses with Symantec Endpoint Protection Anti-Virus software, with updated virus definitions, and has been found virus-free.

Respectfully Submitted,

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